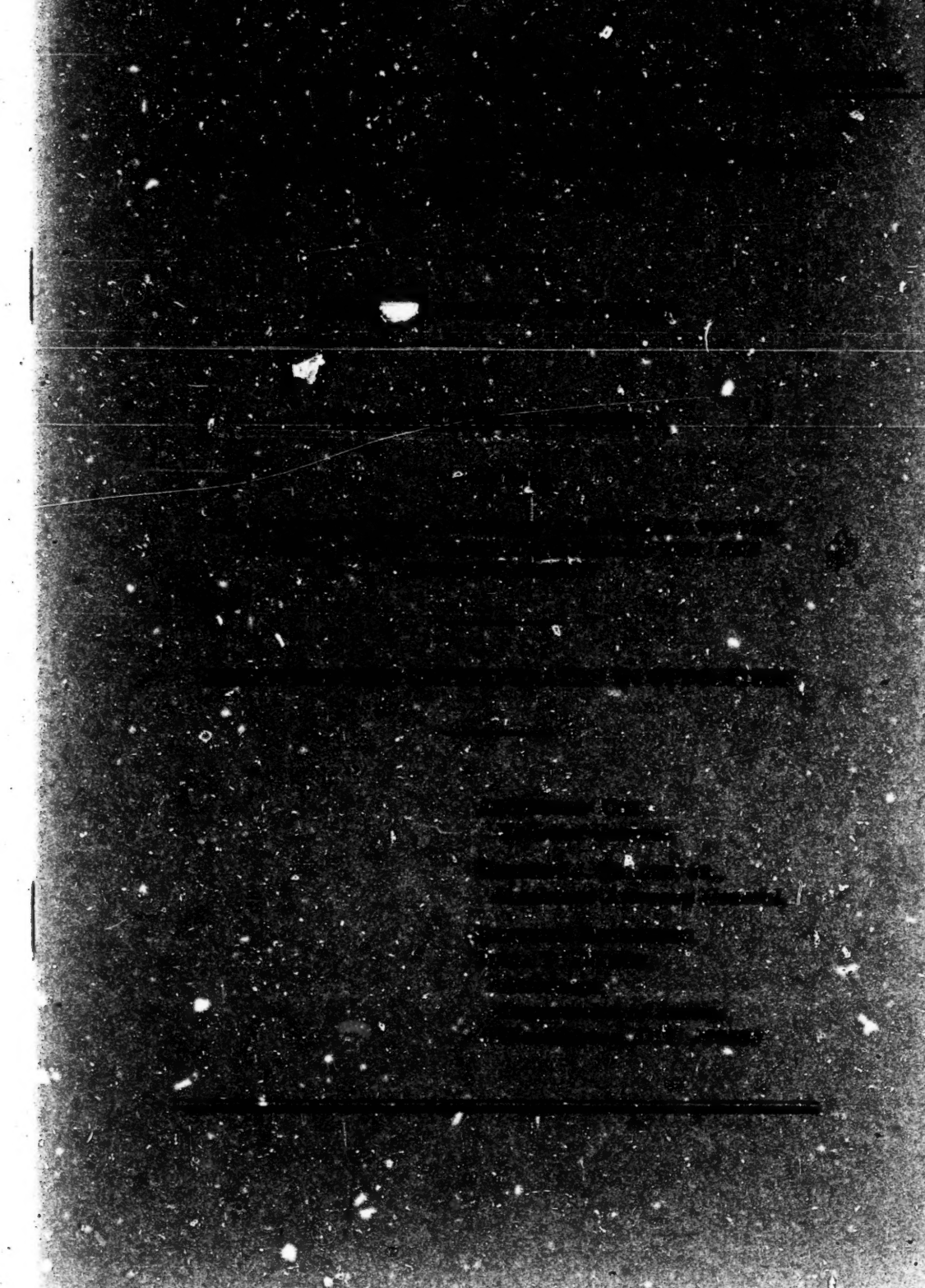


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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 433

ELMER RUEHRUP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 45-54) is reported at 333 F. 2d 641.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1964. A petition for rehearing was denied on July 27, 1964. The petition for a writ of certiorari was filed on August 25, 1964. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's statements, given voluntarily to a federal investigator prior to the initiation of prosecution against petitioner, after he was fully advised as to all rights, including the right to have counsel present, were admissible at his trial.

2. Whether in a prosecution for making false statements for the purpose of influencing the action of the Farm Credit Administration, venue lay in the district where petitioner prepared the false statements and mailed them to the agency.

STATUTES INVOLVED

18 U.S.C. 1014 provides in pertinent part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the * * * Farm Credit Administration, * * * or any division, officer, or employee thereof, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. 3237(a) provides in pertinent part:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

* * * *

STATEMENT

After waiver of prosecution by indictment, petitioner was convicted by a jury in the United States District Court for the Southern District of Illinois, on three counts of an information charging that, in Alhambra, Illinois, he knowingly submitted false statements to the St. Louis Bank of Cooperatives for the purpose of influencing the action of the Farm Credit Administration, in violation of 18 U.S.C. 1014 (See A. App. 6-8, 20).[1] The court imposed a sentence of imprisonment for 2 years upon each count, the terms to run concurrently, with the further recital that petitioner was to become eligible for parole upon service of a term of 4 months (A. App. 25-26).

The undisputed evidence shows that petitioner became manager of the Alhambra (Illinois) Grain and Feed Company in 1948. The company, which had for years received loans from the St. Louis (Missouri) Bank of Cooperatives, an agency of the Farm Credit Administration, periodically filed statements with the bank showing *inter alia* the quantity of grain it had on hand. The reports were typed by a company employee from a rough draft of figures supplied by petitioner, approved by him and then mailed to the bank (G. App. 12-13; A. App. 68-69).

In January 1961, the bank sent inspectors to the grain company to measure the quantity of soybeans in storage. Petitioner then admitted to the bank representatives and to grain company stockholders and di-

[1] "A. App." has reference to the appendix of appellant in the court below and "G. App." to that of the government.

rectors that there were approximately 100,000 fewer bushels of soybeans in storage than were recorded on company books and records (G. App. 1-10), an estimate which proved to be substantially correct. Petitioner explained that the overstatement of inventory developed over the months and years as he, in an attempt to cover company losses in connection with its "expeller" processing of soybeans into meal and oil,[2] repeatedly listed on company books smaller figures than the quantities of beans actually transferred for processing (G. App. 7-8). Thereafter the company was adjudicated a bankrupt.

In addition to this proof developed through the testimony of bank officials and grain company employees (and corroborated by petitioner's own trial admissions[3]), the government produced a statement given by petitioner to an F.B.I. investigator during an interview at petitioner's home on August 8, 1962. In the statement petitioner admitted his manipulations resulting in false representations as to inventory and his preparation of certain fictitious contracts in an effort to show profits for years during which there were actually losses (see A. App. 51-57).

The defense moved to suppress the statement on the ground that it had been obtained during a time

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[2] The "expeller process" by which beans were pressed between rollers was allegedly less efficient than the "solvent extraction process" of petitioner's competitors who applied a chemical to the beans.

[3] At trial petitioner admitted that he had made the false computations and had given them to the company bookkeeper (A. App. 62).

when the government was contemplating prosecution and in the absence of petitioner's attorney (A. App. 43). Evidence was heard out of the presence of the jury as follows:

The F.B.I. agent testified that he told petitioner specifically that he was investigating the shortage of grain at the company (A. App. 35, 37). He told petitioner that he was under no obligation to discuss the matter, that prior to any discussion he had the right to consult an attorney, and that he had the right to have an attorney present at any discussion (A. App. 28, 30, 35, 38). He recalled that petitioner indicated that he then had counsel but he denied that petitioner indicated that he desired counsel's presence (App. 31, 33). Asked why he did not defer the discussion until counsel (then out of town) was available, the agent explained that petitioner stated that, since he had already discussed the matter with others, including corporate directors, it made no difference whether or not counsel was present (A. App. 35, 38). Petitioner indicated that he would willingly sign a written statement. When the agent returned the following day petitioner did sign a statement; petitioner's wife signed as a witness (A. App. 31, 49). The agent knew at this time that prosecution was possible, but he did not know whether in fact it was contemplated (A. App. 34).

Counsel who had represented petitioner for some 20 months prior to August 8, 1962, testified that, on August 20, 1962, he discussed with the United States

Attorney the question of waiver of indictment on the part of petitioner (A. App. 39, 41).

Petitioner, testifying in his own behalf, confirmed that on August 8, 1962, the agent had identified himself as an F.B.I. agent and told petitioner that he had the right to have counsel present (A. App. 44, 45). Petitioner said, "I told him that my counsel was out of town, but I would discuss the matter with him, and that was it" (A. App. 45). Petitioner alleged that the agent said that the presence of counsel was not necessary (A. App. 47). He denied that he told the agent that presence or absence of counsel made no difference in view of his previous admissions to others but he admitted that he had in fact made such previous admissions (A. App. 47). He admitted also that he had read the written statement before signing it (A. App. 49).

The statement recited, *inter alia*, that it was made voluntarily to the F.B.I. agent without threats, promises or duress of any kind. It recited that petitioner realized both that he had the right to consult an attorney prior to making any statement and that any statement might be used against him in a court of law (A. App. 51).

At the conclusion of the hearing, the court denied petitioner's motion to suppress the statement. It also denied a motion to expunge from the statement claimed irrelevant references to the fictitious contracts. It held and instructed the jury that these matters were admissible only for purposes of showing intent (A. App. 10, 58, 63).

ARGUMENT

1. The court below properly rejected petitioner's claim that statements made by him prior to arrest were inadmissible at trial as having been obtained at a time when he was denied effective assistance of counsel in violation of the Sixth Amendment. The cases of *Massiah* v. *United States*, 377 U.S. 201, and *Escobedo* v. *Illinois*, No. 615, O.T. 1963, June 22, 1964 (relied upon in a petition for rehearing below), do not call for a reexamination of this holding. In *Massiah* this Court held that the use at trial of statements secured by surreptitious means "after he had been indicted and in the absence of his counsel" denied Massiah the basic protection of the guarantee of the aid of counsel (377 U.S. at 206). In *Escobedo*, police, acting upon information received from a co-defendant, took the defendant to the police station in handcuffs, interrogated him, and ignored his repeated pleas and that of his counsel that they be permitted to see each other. This Court, in holding Escobedo's statements inadmissible, refused to attach significance to the argument that he, unlike Massiah, had not been *formally* indicated, stating (see No. 615, O.T. 1963, slip sheet, pp. 12-13):

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to con-

> sult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" * * *.

In the instant case petitioner, at the time he discussed his misrepresentation as to company records with an F.B.I. agent, was neither under indictment or formal charges (as was Massiah) nor in custody and in practical effect an accused (as was Escobedo). The F.B.I. agent was acting in an investigatory capacity with respect to a company "shortage" and he so informed petitioner. There was no surreptitious conduct on his part (as in *Massiah*) and no failure to inform petitioner of his rights (as in *Escobedo*). The evidence is undisputed that the agent identified himself and his purpose, informed petitioner that he need make no statement, that he had the right to have counsel present and that any statement he made might be used against him in a court of law. The record does not show that petitioner requested the presence of counsel (as did Escobedo); petitioner makes no claim that he did and the testimony of the agent was that he did not. Petitioner's admission that he had given the story of the misrepresentations to other witnesses, and his ready admissions at trial relative to the misrepresentations, lend credence to the testimony of the agent that it was petitioner who took the initiative in deciding to talk freely and voluntarily without counsel.[4] There was

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[4] Petitioner recognized the weakness of any argument that counsel's presence could have been significant in view of the

no refusal to honor a request for counsel which could constitute a denial of "the assistance of counsel." (See *Escobedo, supra*).

2. Petitioner contends that the offense proscribed in 18 U.S.C. 1014 (see p. 2, *supra*) is the communication of the false statement and that, therefore, venue lay only in St. Louis, Missouri where the false statements were delivered. As the court below held, the trial court properly denied petitioner's motions for acquittal based upon this contention.

Petitioner, in Illinois, prepared drafts of the false reports and gave them to a company employee with the understanding that they would be copied and mailed to the bank for the purpose of influencing the action of that agency with respect to credit. The employee in Illinois typed the reports, submitted them to petitioner for approval and then deposited them in the mail. The courts below properly concluded that the offense was begun in Illinois where the statements were prepared with fraudulent purpose and completed in Missouri where the statements were received. Hence, under 18 U.S.C. 3237, *supra*, venue lay in either district. See *Henslee* v. *United States*, 262 F.2d 750 (C.A. 5), certiorari denied, 359 U.S. 984; *De Rosier* v. *United States*, 218 F.2d 420 (C.A. 5), certiorari denied, 349 U.S. 921; *United States* v. *Miller*, 246 F.2d 486 (C.A. 2), certiorari denied, 355 U.S. 905.

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fact that previously, and consistently thereafter, he admitted the misrepresentation of company records resulting in the crime. He argues here that counsel could have protected him against admission of other activities introduced at trial as bearing solely on intent.

It is true that in *Travis* v. *United States*, 364 U.S. 631, relied upon by petitioner, where the defendant was charged with the making and filing of false non-Communist affidavits required by Section 9(h) of the National Labor Relations Act, the Court held that venue lay only in Washington, D.C., where the false writings were filed with the National Labor Relations Board, and not in Colorado where they were executed and mailed. However, the Court reached this result on the basis of statutory interpretation—reasoning that because the National Labor Relations Act required that the Board make no investigation nor issue any complaint "unless there is on file with the Board" a non-Communist affidavit, the filing must be completed before there was a "matter within the jurisdiction of the Board," within the meaning of the false statement statute (18 U.S.C. 1001). See 364 U.S. at 635, 636. The Court thus found that Congress had "carefully specified" the "locus" of the offense. 364 U.S. at 637. It recognized that a different result might have been reached under a different statutory design. 364 U.S. at 635. Cf. *Imperial Meat Company* v. *United States*, 316 F.2d 435, 440 (C.A. 10).

Here, where the statute defining the crime does not specifically fix venue, the court must base its determination on the "nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Cores*, 356 U.S. 405, 408. The acts constituting this crime took place in both Illinois and Missouri and the prosecution was thus properly brought in Illinois. The result is in keeping with the policy of

relieving the accused of possible inconvenience incident to prosecution in a district other than that of his residence. *Cores, supra*, 356 U.S. at 410.[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
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Attorneys.

SEPTEMBER 1964

[5] There is no merit in petitioner's suggestion that the information is so vague as to permit his subsequent prosecution in Missouri on the same charges involved here. The false statements were sufficiently identified in the record so that no further prosecution could be based on the filing thereof.

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